

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Greenberg Smoked Turkeys, Inc.	§	
	§	
Plaintiff,	§	Civil Action No. 6:13-cv-117
	§	
v.	§	JURY TRIAL DEMANDED
	§	
eBay, Inc.	§	
	§	
Defendant.	§	

COMPLAINT

Plaintiff Greenberg Smoked Turkeys, Inc., by and through its undersigned counsel, files this Complaint for declaratory judgment and injunctive relief against Defendant eBay, Inc. (“eBay” or “Defendant”), and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action seeking a declaration that Defendant’s wrongful and unauthorized use of Plaintiff’s federally-registered trademarks and confusingly similar marks in their advertisements infringes the rights of Plaintiff Greenberg Smoked Turkeys, Inc. (“Plaintiff or “Greenberg”). Plaintiff’s claims arise under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Lanham Act, 15 U.S.C. § 1051, *et seq.*

PARTIES

2. Greenberg is a Texas corporation with its principal place of business at 221 McMurrey Drive, Tyler, Texas 75702. Greenberg is engaged in the business of making and selling smoked turkeys.

3. Upon information and belief, eBay is a Delaware corporation, with its principal place of business at 2145 Hamilton Ave., San Jose, CA 95125.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction under the provisions of 28 U.S.C. § 1331, as a matter arising under the laws of the United States; under the provisions of 28 U.S.C. § 1338(a), as a civil action arising under an Act of Congress pertaining to trademarks, under the provisions of the Lanham Act, 15 U.S.C. §§ 1116 and 1121; and under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

5. This Court has personal jurisdiction over Defendant because Defendant regularly transacts business in the state of Texas and this judicial district, and has purposely availed itself of this forum by its activities in this district, and the causes of action in this complaint arise out of those activities. Defendant has solicited business in this judicial district and has perpetrated tortious acts within this judicial district by committing acts of trademark infringement, trademark dilution and unfair competition. These acts have caused injury to Plaintiff in this district, where Plaintiff is located, and throughout the United States.

6. Venue lies within this District based upon the provisions of 28 U.S.C. § 1391(b) and (d).

FACTUAL BACKGROUND

7. The Greenberg family of Tyler, Texas owns and operates Greenberg Smoked Turkeys, Inc., the plaintiff in this case. Plaintiff has been making and selling its famous smoked turkeys since approximately 1938. Today, Plaintiff makes and sells hundreds of thousands of smoked turkeys each year to customers in Texas and in every other state throughout the United States, and is well-known nationwide as a purveyor of the finest smoked turkeys available.

8. Plaintiff receives extensive media coverage for its exceptionally high quality smoked turkey products. In addition to numerous local and regional media reports and publications, Plaintiff has been featured in national publications such as the New York Times, The Wall Street Journal, Bon Appetit, Forbes, Kiplinger's, Southern Living, and Fast Company, and on national television on programs such as the Oprah Winfrey show.

9. Plaintiff is the owner of several federally-registered trademarks, including U.S. Trademark Registration No. 2,614,281 for the mark GREENBERG SMOKED TURKEY® and U.S. Trademark Registration No. 1,444,298 for the mark GREENBERG® (collectively, the "GREENBERG® Marks"), each of which is valid and in full force and effect. Plaintiff has used the GREENBERG® Marks as trademarks since as early as 1938, and obtained its first registration in 1987. The GREENBERG® Marks have become incontestable, by reason of appropriate filings under Section 15 of the Lanham Act, 15 U.S.C. § 1065. Copies of the federal registrations for the GREENBERG® Marks are attached as **EXHIBIT A**.

10. In addition to all the media coverage it receives, Plaintiff expends great resources to further advertise and promote the GREENBERG® Marks in commerce in connection with its smoked turkeys in Texas and throughout the United States on the internet and in print and other media.

11. Plaintiff is the sole source for the smoked turkeys sold under the GREENBERG® Marks, and carefully supervises, monitors, and controls the quality of all smoked turkeys sold under the GREENBERG® Marks to ensure that the products its customers receive are of a consistently high quality.

12. Plaintiff has expended significant capital and has devoted substantial amounts of time and money to the production, marketing and promotion of the smoked turkey products sold

under the GREENBERG® Marks. As a result, the GREENBERG® Marks have become widely known, and are extremely valuable to Plaintiff in its business, as they uniquely identify Plaintiff's smoked turkey products to the public.

13. As a consequence of Plaintiff's continuous and extensive use, advertising, marketing and promotion of the inherently strong GREENBERG® Marks and of the smoked turkey products bearing the GREENBERG® Marks, the GREENBERG® Marks have become famous, are distinctive of Plaintiff's smoked turkey products, and have strong secondary meaning.

14. Plaintiff monitors and polices misuse and infringement of the GREENBERG® Marks, and takes appropriate enforcement action as needed, including sending cease and desist letters.

EBAY'S UNAUTHORIZED USE OF THE GREENBERG® MARKS

15. Upon information and belief, eBay owns and operates an internet business called eBay.com.

16. Upon information and belief, eBay.com places sponsored keyword advertisements on at least mobile Google search result pages, to attract consumers to its eBay.com website.

17. Upon information and belief, since sometime prior to December, 2012, eBay.com has purchased "Greenberg Smoked Turkeys" and/or the GREENBERG® Marks for some of its keyword advertisements. As a result, when a member of the public uses the Google search engine on a mobile device to perform an internet search for "Greenberg Smoked Turkeys," their search result could contain an advertisement from Defendant, prominently placed above or below the actual results of the search.

18. Not only does Defendant use the GREENBERG® Marks as a trigger to populate search results with its advertisements; the text of Defendant's sponsored advertisements actually contains the GREENBERG® Marks, or text confusingly similar to the GREENBERG® Marks.

19. Thus, for example, when a consumer in this district seeking Plaintiff's products enters a search for "Greenberg Smoked Turkeys" on a mobile device, such as a cell phone, using the Google search engine, the results of that search sometimes contain an eBay.com advertisement with the following text:

Greenberg Smoked Turkeys
www.ebay.com/
★★★★★ 634 seller reviews
Bid on **Greenberg Smoked Turkeys** now!
Shop on the eBay App today.

or

Greenberg Smoked Turkeys
m.ebay.com/
Looking for Great Deals? Shop on the eBay
App Today.

The first line of these advertisements contain a hyperlink which when clicked redirects the consumer to the eBay.com website. See screenshot of actual Google.com mobile search results at

EXHIBIT B.

20. As a further example, when a consumer seeking Plaintiff's products enters a search for "where can i buy greenberg turkey" on a mobile device, such as a cell phone, using the Google search engine, certain results contain an eBay.com advertisement with the following text:

Greenberg Smoked Turkey
www.ebay.com/
★★★★★ 643 seller reviews
Find **Greenberg Smoked Turkey** on eBay.
Free Shipping Available Now!

The first line of this advertisement contained a hyperlink which when clicked redirects the consumer to the eBay.com website. See **EXHIBIT B**.

21. Such eBay.com advertisements employ Plaintiff's Greenberg Smoked Turkey® mark without authorization, and are false and misleading, because eBay.com does not provide Greenberg Smoked Turkey®. The eBay.com website does not offer Greenberg Smoked Turkey® for sale and does not provide any information about Greenberg Smoked Turkey®. As such, the sponsored advertisements placed into internet search results by Defendant's eBay.com business do not use the GREENBERG® Marks in any way that could be considered permissible under the law.

22. Rather, Defendant, through the advertisements placed by its eBay.com business, infringes Plaintiff's GREENBERG® Marks, deliberately attempting to poach Plaintiff's potential customers, capitalizing and piggybacking unfairly on Plaintiff's famous GREENBERG® Marks and goodwill to divert consumer traffic and revenue to its own website.

23. Plaintiff's counsel sent a letter to eBay on November 29, 2012, demanding that it cease and desist from such infringing activity.

24. Despite Plaintiff's request, eBay did not respond to the November 29, 2012 letter until January 2, 2013, and then, only by email from one "Michael B." with no identifying title or contact information. A copy of this email response is attached as **EXHIBIT C**.

25. Plaintiff immediately responded via email to the January 2, 2013 email requesting a more formal resolution of the matter. **EXHIBIT C**. eBay never responded to this request.

26. Plaintiff was unable to verify Michael B.'s position within eBay or determine whether Michael B. had or has authority to speak on behalf of or bind eBay in any manner.

27. On January 10, 2013, Plaintiff's counsel sent a second letter to eBay, again requesting a formal resolution to eBay's infringing activity. This letter also enclosed a draft settlement agreement that, if executed, would have fully and finally resolved the matter between Plaintiff and eBay.

28. However, once again, eBay simply ignored this request and has never responded in any manner to the January 10, 2013 letter.

29. Despite the fact that eBay appears to have temporarily ceased running the advertisements described in the above Paragraphs 19 and 20, other than the cryptic January 2, 2013 email, eBay has demonstrated no intent to comply with Plaintiff's request that it permanently cease and deist its infringing activity.

30. Plaintiff has never granted Defendant any right to use or any other rights to the GREENBERG® Marks.

31. Defendant's use of the GREENBERG® Marks or confusingly similar marks in their online advertisements impinges on and threatens to destroy the goodwill Plaintiff has built up over a long period of time in connection with the sale of quality smoked turkeys. Plaintiff has no way of insuring the quality of the goods promoted, advertised, purchased, imported, offered for sale, sold, distributed and/or marketed by Defendant. And yet, if they even exist, any products, particularly any smoked meat products, marketed and/or sold via eBay.com appear to be either emanating from Plaintiff or to be sponsored by or otherwise affiliated with Plaintiff, by virtue of Defendant's unauthorized use of the GREENBERG® Marks and marks confusingly similar thereto.

32. Moreover, continued usage of the GREENBERG® Marks or confusingly similar marks by Defendant will continue to confuse and misdirect consumers seeking Plaintiff's products.

33. The use by Defendant of trademarks identical or confusingly similar to that of Plaintiff's GREENBERG® Marks in connection with the promotion, advertising, and/or marketing of its business constitutes the use in commerce of the reproduction, copy, or colorable imitation of a registered trademark, as well as the appropriation of Plaintiff's goodwill and reputation associated with the GREENBERG® Marks, which is likely to cause confusion or to cause mistake or to deceive, and to cause losses in sales of Plaintiff's genuine Greenberg Smoked Turkey®.

34. Plaintiff and the public will continue to suffer irreparable injury unless Defendant is restrained from using the GREENBERG® Marks, or any names confusingly similar thereto, in its sponsored advertisements.

35. If not permanently enjoined by the Court, Defendant will continue to mislead and misdirect consumers away from Plaintiff's genuine Greenberg Smoked Turkey products, and will continue to promote, advertise, offer for sale, sell, distribute and/or market other products in commerce in connection with the GREENBERG® Marks, which will be perceived as having emanated from Plaintiff. Plaintiff, however, has no control over the nature and quality of the information or products available on Defendant's eBay.com website, and any fault or objection with such information or products will adversely affect Plaintiff's reputation and future sales of genuine Greenberg Smoked Turkey® sold under the GREENBERG® Marks.

36. Plaintiff needs permanent injunctive relief to prevent future harm caused by Defendant to Plaintiff's rights in the GREENBERG® Marks and to its business.

37. Plaintiff cannot be adequately compensated at law.

COUNT I

Declaratory Judgment of Infringement

38. The allegations contained in the foregoing paragraphs are incorporated herein by reference and made a part of this Count as if fully set forth.

39. Defendant's use of the GREENBERG® Marks infringes existing and valid trademark rights of Plaintiff under the Lanham Act (15 U.S.C. § 1125(a)) and Plaintiff requests a declaratory judgment to that effect.

COUNT II

Injunction

40. The allegations contained in the foregoing paragraphs are incorporated herein by reference and made a part of this Count as if fully set forth.

41. Defendant's use of the GREENBERG® Marks infringes existing and valid trademark rights of Plaintiff under the Lanham Act (15 U.S.C. § 1125(a)) and Plaintiff is entitled to an injunction permanently enjoining the acts complained of herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands that:

A. The Court declare that Defendant's use of the GREENBERG® Marks infringes existing and valid trademark rights of Plaintiff under the Lanham Act (15 U.S.C. § 1125(a)).

B. Defendant, its directors, officers, partners, agents, servants, employees, representatives and attorneys, and all persons in active concert or participation with them, be permanently enjoined from the use of the GREENBERG® Marks, or other similar marks which are likely to cause consumer confusion and infringe the GREENBERG® Marks.

C. Defendant, its directors, officers, partners, agents, servants, employees, representatives and attorneys, and all persons in active concert or participation with them, be permanently enjoined from doing, aiding, contributing to, causing and abetting any of the following:

(1) directly or indirectly using or infringing any of the GREENBERG® Marks by using any colorable imitations or confusingly similar facsimiles thereof;

(2) advertising purchasing, importing, offering for sale, selling, distributing and/or marketing smoked turkey products using the GREENBERG® Marks or any counterfeits, copies, or colorable imitations thereof;

(3) directly or indirectly using in connection with the advertising, purchase, importing, offering for sale, selling, distributing and/or marketing of any smoked meat products, particularly smoked turkeys, any of the GREENBERG® Marks, or any marks, emblems, logos, or terms which in any way imitate or simulate any of Plaintiff's GREENBERG® Marks; and

(4) engaging in any acts or activities, directly or indirectly, calculated to trade upon any of the GREENBERG® Marks, or the reputation or goodwill of Plaintiff, or in any manner to compete unfairly with Plaintiff.

D. Defendant be required to pay Plaintiff's attorneys' fees, costs and expenses pertaining to this action as authorized under applicable law.

E. This Court award Plaintiff such other and further relief at law or in equity as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff respectfully demands a trial by jury of all issues so triable.

Respectfully submitted,

/s/ E. Glenn Thames, Jr.

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